UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

C.D., by and through her PARENTS AND NEXT FRIENDS, M.D. and P.D.,	)	Civil Action
Plaintiffs	)	No. 15-cv-13617-FDS
vs.	)	
NATICK PUBLIC SCHOOL DISTRICT and BUREAU OF SPECIAL EDUCATION APPEALS,	)	
Defendants	)	

BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

REDACTED/CORRECTED TRANSCRIPT

MOTION HEARING

John Joseph Moakley United States Courthouse
Courtroom No. 2
1 Courthouse Way
Boston, MA 02210

December 1, 2016
11:00 a.m.

Valerie A. O'Hara, FCRR, RPR
Official Court Reporter
John Joseph Moakley United States Courthouse
1 Courthouse Way, Room 3204
Boston, MA 02210
E-mail: vaohara@gmail.com

APPEARANCES:

For The Plaintiffs:

Martucci Law Associates, by LAURIE P. MARTUCCI, ATTORNEY, 20 Cabot Boulevard, Suite 300, Mansfield, Massachusetts 02048;

For the Defendant Natick Public School District:

Murphy, Hesse, Toomey, and Lehane,
by DORIS R. MACKENZIE EHRENS, ATTORNEY, and
FELICIA S. VASUDEVAN, ESQ., Suite 410
300 Crown Colony Drive, P.O. Box 9126,
Quincy, Massachusetts 02269-9126.

For the Defendant Bureau of Special Education Appeals:

Attorney General's Office, by IRAIDA J. ALVAREZ, ATTORNEY, One Ashburton Place, Boston, Massachusetts 02108.

PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of C.D., By And Through Her Parents and Next Friends, M.D. and P.D., et al, vs. Natick Public Schools, et al., Civil Action Number 15-13617.

Would the parties please identify themselves for the record.

MS. MARTUCCI: Laurie Martucci appearing on behalf of the plaintiffs.

11:02AM THE COURT: Good morning.

MS. VASUDEVAN: Felicia Vasudevan on behalf of Natick Public Schools with Doris Ehrens.

MS. EHRENS: Good morning.

THE COURT: Good morning.

MS. ALVAREZ: Iraida Alvarez, Assistant Attorney General for the Bureau of Special Education Appeals.

THE COURT: Good morning. This is the hearing on the motion for summary judgment. I've read the materials. It would be helpful to me because they cover a lot of ground and

11:02AM sometimes aren't maybe quite as focused as I might like to take it from the top.

I'm familiar with the legal framework, but, as a factual matter, you know, what happened, what specifically plaintiff said went wrong as a matter of procedure or substance and what the school district's and BSEA's response is, but let

me start with you, Ms. Martucci.

MS. MARTUCCI: Thank you, your Honor. Good morning. May it please the Court, my name is Laurie Martucci, and I'm appearing on behalf of the plaintiffs, M.D. and P.D., and their daughter, C.D.

We're here on a motion for summary judgment appealing the decision of the Bureau of Special Education Appeals, which found that the IEPs developed by the Natick Public School System for the 2012-2013, 2013-2014 and 2014-2015 school years provided C.D. with a free, appropriate public education in the least restrictive environment pursuant to the Individuals with Disability Education Act.

This case is about a child with mild disability and communication disorders who returned to the Natick Public School District in the summer of 2012.

THE COURT: Could I get you to move the mic. closer?

MS. MARTUCCI: Oh, I'm sorry, thank you. To answer your question with regard to exactly what happened in this case, I'll start in 2012 of May, the child in this matter had attended the Christa McAuliffe Charter School in Framingham, Massachusetts for three years in the general ed. classroom with appropriate supports and services after having been placed there by her parents for sixth, seventh and eighth grade. She had attended Natick Public School through the fifth grade, and then they placed her at the charter school.

Toward the end of eighth grade, in May, the charter school ends in eighth grade, so the parents started looking for what they were going to do for the child with the upcoming educational situation, so they contacted Natick and asked if they could come in for a meeting to find out what was available in Natick as part of their decision-making process.

Natick held a meeting in May of 2012, at which the parents attended, the parents brought Ms. Nan Coellner, Ms. Marcia Soden, Ms. Suzanne Flax and Dr. Steve Imber, who was the educational consultant. To go back, Ms. Flax was the child's speech language pathologist, who had seen her every Saturday for many years, since she was 10 years old.

Nan Coellner and Marcia Soden, who were two retired special education teachers, who had over 30 years of experience in the Boston Public Schools were hired by the parents to assist in the classroom by providing services as needed, excuse me, to keep her on track, redirect her, that sort of thing in the classroom to make sure that she could access the material.

It was as-needed support. She sat in the classroom in the general ed. environment and participated, accessed the Massachusetts Curriculum Frameworks and succeeded beyond what anybody really expected actually.

She actually passed the MCAS in the eighth grade. I don't remember if I mentioned it, but she has a mild intellectual disability. Her I.Q. is 70, so it's right on the

border of intellectual disability. She also has some relatively significant communication disorders, which affect her memory, but on the other end of the spectrum, she's an incredibly unique child as far as children go with disabilities.

She's the kind of child that any parent would want as far as her work ethic and her ability to do homework, her desire to do homework actually and ability to learn, desire to learn and desire to want to be in a general ed. environment as Congress intended when they enacted the Act to make sure that children with disabilities are included in the general ed. setting to the maximum extent appropriate with supports and services and only removed if those supports and services are not possible to help them to benefit.

And, by the way, the benefits, as I'm sure you know, the benefits are not just related to academic benefits, they also include social benefits, emotional benefits, and she achieved benefits in all areas at McAuliffe.

She went from a child that barely spoke in fifth grade and could barely write to a child that was writing full paragraphs, that was acting as described in the class, that was going from class to class with the group, not with the group, actually, individually. She was going by herself with whoever she wanted to between classes.

She went to electives and lunch by herself without any

support, and she really, she was the -- she was the poster child, I couldn't think of a better word, for inclusion that Congress envisioned because she did exactly what was the purpose of the Act in having the preference for mainstreaming children with disabilities.

So the parents went in May, and they had a meeting, and Natick discussed what the options were for programs at Natick. There was the general ed., then there was something called replacement classes, which are small group classes. All the children in those classes have IEPs, and they're slightly smaller than the number of children in the general ed. classes, and then there's the ACCESS program, which is the self-contained program. It's a life skills program.

Every school has one, which Natick had at the time, it had only nine students, only one girl with fairly significant intellectual disabilities, autism, some other things, were the disorders, and those were the three programs that were available at Natick, which was described to the parents.

The parents presented Natick with information from the people they brought with them, Ms. Soden and Ms. Coellner, who shared the job, I should say. They were there every day of the week but three days to two days, that sort of thing. For three years they spent every day with her. They sat in the back of the classroom mostly. They helped her as needed. So they explained everything to the school.

I did submit a transcript as part of the record, which when you look, it's clear that Natick was not really open to hearing what was being said, but they said it anyway. They told her all about how she's succeeded, how well she was doing and what they were looking into. They had been looking into charter schools, they were looking into all sorts of schools just to figure out what to do at this point because the other school had ended, so they encouraged Natick to go out to McAuliffe.

11:09AM Several times they encouraged them go out and see her because it's really hard to see this child on paper and envision her because she doesn't appear right as she is on paper, as most children don't on just paper, which is why Congress suggests, not suggests, mandates that schools consider a variety of sources, not just paper, not just evaluations, everything that they can get in order to determine exactly who the child is, what their individual needs are, who they are, so that they can make a program that's unique and devised specifically for that child.

11:10AM So the meeting ended and then Ms. Gina Dalan, who was the special ed. director of Natick at the time, went out to McAuliffe and observed C.D. in her class.

THE COURT: McAuliffe was the charter school?

MS. MARTUCCI: Yes, I'm sorry, McAuliffe, Christa McAuliffe Charter School. She observed the child, and

Mr. -- I'm sorry, the father asked for a copy of the notes that Ms. Dalan took, and he was told that there were no notes. He was concerned about that because he knew that Ms. Dalan would be leaving the district before like I believe in the middle of June, early June, and he wanted to make sure that her successor had information about the observations so that they would know their child because at the time nobody knew that child except for people that -- the parents and the people that came with them to the meetings, so nobody at Natick knew the child at all, and they encouraged get to know her so we can do it as a team, like we're supposed to do.

11:11AM

So Ms. Dalan did say that she saw, that it was a short observation, whatever, but she saw the child working by herself doing her work, whatever, in the class, and she saw the special ed. teacher, Ms. Coellner, and Ms. Soden were at the back of the room, but that's really all the information she gave.

Shortly after that, the parents received a letter from Ms. Dalan saying that after observing C.D., she recommends that, as was discussed in May, because at the May meeting, the Natick team did say, well, we can start her in the ACCESS program now if you'd like, and, of course, the parents were not happy with that because, first of all, Congress mandates that they look at inclusion as a preliminary issue and only remove the child if she can't be educated in the general ed. environment, so they certainly weren't going to just agree to

11:11AM

start her in the ACCESS program, but they were hoping that once Ms. Dalan or whoever saw C.D. at school, they would see what they knew, which is that this child is the epitome, that's the word I was trying to think of, of what Congress envisioned in suggesting that students with disabilities should be mainstreamed to the maximum extent appropriate with non-disabled peers.

So, anyway, they got this letter from Ms. Dalan that said, as we had discussed in the May meeting, we are recommending that you put -- that we place C.D. in the self-contained ACCESS program at Natick High School for all of her academic classes, all of core academics, and that's the recommendation.

So, in that sense, it would have been a comparable program. I'm sorry, they were required to do a comparable program pursuant to the regulations because the child was a transfer student, and that's the requirements of the regs. when a child transfers from one school to another, the receiving district needs to either provide a comparable IEP or create a new IEP, or there's some options, but basically it's a comparable IEP until a new IEP can be developed.

The parents, based on the fact that it seemed like Natick was not really willing to listen them, they didn't want to put the child in a program that they really seriously believed was completely inappropriate for her, so what they

asked for is they asked Natick if Natick would be willing, instead of doing a comparable program under the transfer regs., if they would be willing to actually create a new IEP for the child so that they could have a more comprehensive meeting, look at all the things, all the aspects of her unique abilities and needs and figure out an actual new IEP during the summer rather than waiting until the fall so that she could have an actual IEP instead of a comparable IEP, and Natick agreed to do that, which was nice, and then they established a meeting. They set a meeting, they established a meeting, scheduled a meeting for July.

11:14AM

At that point, Ms. Dalan had left the district, so she was not available to be at the meeting. The parents attended the meeting in July of 2012. They again brought Ms. Soden and Ms. Coellner, and I don't think Ms. Flax went to that. Dr. Imber was also there.

They brought -- they sent all sorts of records from McAuliffe. There was a checkoff sheet that was filled out by the guidance counselor at McAuliffe, which in concert with the teachers that worked with C.D., they recommended that C.D. enter into all college prep. classes in the general ed. environment at Natick. That was their recommendation, and they provided that information to Natick.

11:15AM

The parents provided all that, but based on the -- if you look at the transcript, Natick was not willing to listen to

anything they said. They did not follow the rules, which basically say that as a preliminary matter, schools must discuss the general ed. environment first, talk about how the child can access the curriculum in the general ed. environment, and only when there's no way that they believe she can do so with appropriate supplemental support, supplementary aids and services, at that point they can discuss going further along the continuum to the less next restrictive placement on the continuum.

11:15AM However, instead of doing any of that, Natick basically just said we believe the ACCESS program, the most restrictive placement, is the appropriate placement for C.D., and that's it.

The parents asked can we consider general ed., can we consider the replacement classes? The answer they received was no, basically what we see on papers means ACCESS. They did not explain why she couldn't succeed in the lesser restrictive environments. They didn't know her. There was nobody there who knew her.

11:16AM Interestingly, C.D. had actually attended summer services at Natick a couple weeks before the meeting in early July, so she was known to staff at Natick. She was known to -- I forget her name, but there were two teachers that worked with her in the summer at Natick. Neither of them were invited, I don't know if they were invited, but neither of them were in

attendance at the meeting in July. There was no one there from the ACCESS program, which Natick ended up proposing, which you would know from reading the transcripts and the submissions.

There were no guidance counselors there, even though basically, not basically, if C.D., sorry, if C.D. attended the ACCESS program, her only potential chance to be with nondisabled peers would have been in electives, so it was important for them to get that kind of information from the school, so they went to the meeting.

11:17AM The Natick staff who did not know her at all, never met her, never had anything to do with her said, well, we're not going to listen to you, in effect, and it's our opinion for no reason that they told anybody that C.D. needs to -- actually, they did give two reasons. They said C.D. needs to be in the ACCESS program because of some low test scores she had in a most recent evaluation, not all of her test scores but some of them and also the hearing the parents had in the past in 2011 at the bureau in front of Hearing Officer Crane, so they were basing their decision about her current needs on

11:18AM something that happened in the past.

They weren't listening to anything that anybody was telling them about her current needs or current achievements, and also it was misrepresented, I believe, with regard to the hearing in 2011, while it was only a year earlier, the hearing in 2011, the issue at the hearing that was decided was whether

or not the IEP proposed by Natick in sixth grade, which was 2009, was appropriate for C.D.

There was no discussion of her current achievements at McAuliffe were not part of the hearing that they attended in 2011 because it was after, it was subsequent to the IEP that was developed, so they couldn't have known under the *Roland* decision, the hearing officer decided that there was no way they could have had the information that was available after they did the IEP, so it was appropriate in his opinion, and that was that hearing.

11:19AM

Then she went to McAuliffe, and she blossomed, literally. She was a different person based on the access to the modeling of peers. She had friends. She just blossomed.

So, but basically Natick had told the parents that based on those two things, pretty much the scores and the hearing, which had nothing to do with anything current, they had no knowledge of -- their opinion had nothing to do with the current needs of the child, as they are supposed to.

They also did not explain to the parents why she couldn't succeed in a less restrictive environment, so following that meeting, the parents rejected the IEP, and they unilaterally struck Learning Prep. School, which is a special education school in Newton where she has been attending now since September of 2012.

11:19AM

She's done well there. It's certainly an appropriate

program for her, but it's not a public education, which is what she was entitled to receive, so every year after that -- well, the following year, to take it slower, at the time of her annual review in 2013, Natick had an IEP meeting. They didn't get any information from Learning Prep. School, they didn't do anything to try to update their knowledge of her current progress, as required.

So they provided the parents with an identical IEP to the one they provided that they rejected in 2012. There were no updates, and their reasoning was because they just didn't get any new information.

11:20AM

So they provided the same exact thing, but just to make another point, at this point, C.D. was 15, she had started when she was -- she was 15 at the time, I think she was 16 actually at that point, and my point being is that based on federal law, children who are over 16 need to be -- the school districts are required to do transitional assessments, age appropriate traditional assessments to determine the child's needs with regard to employment and vocational needs, et cetera, so that they can provide transitional services to further the goal of making the child an independent employable following high school.

11:21AM

So they provided the same exact IEP, and father obviously rejected it for the same reasons he rejected the previous one, and C.D. continued to attend Learning Prep. for

tenth grade. That was ninth grade. Then the following year, the school again had a meeting, and, again --

THE COURT: Now we're into 2014, right?

MS. MARTUCCI: Right, 2013 to 2014 was the one IEP, then in April, I think it was April of 2014, they had another meeting, and this was actually a very brief meeting. Supposedly it was only done to avoid having the IEP expire, but there's no legal reason for that that they had to do that, but, anyway, they did that, and in order to ostensibly have a meeting just to do that, they didn't provide anything new at all.

11:22AM

11:22AM

It was exactly the same again as the previous two IEPs, no transition assessment was proposed or done, there was no transition services that were appropriate, and the same exact proposed placement in the ACCESS program, the self-contained most restrictive program, life skills program at Natick for all of her classes, again, they proposed that, so, the parents rejected that. Natick also at that time had proposed that they do a three-year re-evaluation for C.D. because the parents rejected that.

Natick also at that time had proposed that they do a three-year re-evaluation for C.D. because her time for doing that was coming up, so they proposed a three-year re-evaluation, which would include academic testing and some further testing, but they did not propose transitional

assessments, again, even though they were doing a three-year evaluation, so, but, anyway, the parents accepted the request to do the evaluations, Natick performed the evaluations, then in June of that year, the parents, they attended a meeting to discuss the evaluation results, and Natick suddenly proposed an IEP after all this time with a different, they called it a blended program.

Basically it was replacement classes for English, it was general ed. for history, and they were still putting her though in the ACCESS program for math and reading, I believe, but the big issue there was she had passed the English MCAS.

11:23AM

The goal, the vision for her parents in accordance with the vision of Congress was to have her graduate and get a diploma so she could continue with her life. In Massachusetts, as you know, you need to pass the MCAS to do that, so that was a very important goal, and she clearly could do it because she did it already in English and recently in science, so they were not willing to have her to be in the ACCESS program where she clearly could not take the MCAS. That's crystal clear that the children in the ACCESS program do not take the MCAS.

There's been a lot of misrepresentations of that in the pleadings. It's been misinterpreted, I don't know why, but the record is very clear that in order to take the MCAS, a child needs to move out of the ACCESS program into either replacement or general ed. They do not take it in the ACCESS

program. So that was just not acceptable to the parents because C.D. was preparing for the MCAS at Learning Prep.

She was on the track to get a diploma and to pass the MCAS or to take the MCAS, and Natick was asking them to put her back in school in a class with eight or nine children, not prepare for the MCAS and basically learn life skills, have entry points into the curriculum, not actually learn anything substantive under the curriculum frameworks, so that was in June.

11:25AM Oh, and also at that meeting, based on the evaluations, Natick told the parents at the meeting that they were changing C.D.'s disability category after 17 years of being labeled as Intellectual, they were changing it to Communication based on the test is what they said, but the tests actually weren't all that different from her previous tests, so that was kind of suspect, but they insisted on changing her disability category.

They did this without going through the flow chart required by the Department of Ed. to determine the eligibility 11:25AM for special ed. They just came in and said it, so basically it was done without the parents' participation at all. The parents were shocked by this. They were dismayed by it basically. They came to terms to the extent a parent can with their child having an intellectual disability, and now they're being told out of nowhere that they're changing that, so they

were taken back by that, to say the least.

That was that IEP in June, so the parents, while it was better than the previous IEPs, there was still no transitional assessment done, even though now she was 17, there was no transitional assessment proposed, which is odd, considering they did every other evaluation, and then also that the MCAS would not be -- she would not be prepared for the MCAS in math by being in the self-contained ACCESS program, so they were not willing to accept the IEP for those reasons and some other reasons, which are in the record, so they rejected that IEP, and actually about a month before that meeting, before things changed, the parents had filed for due process to get this resolved, figure out whether or not Natick had, as they allege, failed to provide her with a free, appropriate public education in the least restrictive environment.

So the hearing was -- the complaint was filed, the June IEP was rejected, and then something happened. Oh, in the fall of her next year, 2014, they did finally propose a transition assessment, which was performed for C.D., and a meeting was held in November, I believe, where they proposed for more transition services, but as part of that, they proposed an after school one-to-one transition program, which was not in the parents' eyes, it did not make sense for the child, it was way too restrictive, to use that word.

She would have to stay after school, and it certainly

wasn't her fault, and she'd have to be alone, so there would be no peer modeling. It was not an appropriate program. It had never been done before, actually, so it just did not seem appropriate, and the reason for that, for them proposing that program was because she could not take electives if she took the transition class during the day, so it was a scheduling issue that they really couldn't accommodate her because of their scheduling issue.

So the parents rejected that IEP for the reasons I mentioned, and I believe that was November. The parents had asked -- actually, I should mention, the parents asked if they could, after the November meeting, which ended very abruptly, there was a lot going on at the meeting, and the parents just didn't get to ask all the questions, and they had a lot of questions, so they asked Natick if they could have another meeting to answer their questions.

That was not acceptable to Natick, so the parents ended up requesting a meeting through the BSEA, and a meeting was held in January, at which point no changes were made, even though the parents reiterated their concern about MCAS, their concern about the intellectual disability category change and various other concerns, nothing was changed, and that was at that point.

Also, to go back, slightly every time -- they had a lot of questions that never got answered in these meetings,

but, that's all in the record.

In November, I believe it was in November, the parents asked to do observations of C.D.'s proposed program at Natick, so that was eventually worked out, and the parents and their experts saw the program in November. I should mention that in June, they actually had an observation where Dr. Imber, who's the educational evaluator and consultant to the parents, who has known her, again, since she was in fifth grade and tested her several times, he's also a professor at Rhode Island College. He's got over 40 years of experience in the field.

11:29AM

He observed with Ms. Flax, speech language pathologist, in June, they observed the ACCESS program, they thought everything was fine as far as the observation goes, everybody was pleasant. They got a lot of information, but it was very clear to them based on their observations that this was a life skills program, which was not appropriate for C.D. There were children with autism and other issues that were stimming, and it just was not --

THE COURT: What is stimming?

11:30AM

MS. MARTUCCI: It's when autistic children rock and make sounds. It's disruptive. Also, there was only one or two other girls in the program out of nine. That's the whole thing that she would get, and they all had fairly significant disabilities, and several of the students in the class actually were nonverbal.

One student I think he didn't even speak English. He came from China. There was someone else there who was nonverbal. This child with communications disorders specifically needed to have peer modeling of children that had good communication skills, so the peer situation there was completely inappropriate for her.

Anyway, that was in June before they proposed the new IEP anyway, so then in November, the parents had their scheduled observations ready to go, and the last minute before
11:31AM the observations, the parents were informed by Natick through me that they would not be permitted to ask questions at the observations, they could just observe, and that's it.

They were, Dr. Imber, Ms. Flax -- oh, and they had hired Dr. Arlyn Roffman at that point, who was a well -- like renowned transition specialist in this state, and she -- actually, maybe nationally even, to review the transition program at Natick, so they set up the observations for themselves and Dr. Imber, Dr. Roffman, Ms. Flax and Ms. Coellner to observe the proposed program.

11:31AM Natick was not happy about all these people, and they were trying very hard to limit everything. We worked together. I believe we were all being reasonable about limiting the number of people and working with the schedule and everything else, but at the last minute, they were told they couldn't even ask basic questions what was going on in the classroom. They

made it very clear, the evaluators with years and years of experience, it's their practice to ask questions so they could understand how the program would be modified for the student that they're looking at it for, and it was very -- it was impossible basically for them to do appropriate evaluations, not to mention they would have no credibility at the hearing. That was already in process of being scheduled, not no credibility but potentially diminished credibility because they were not able to get the questions answered and provide a comprehensive report for the school to review.

11:32AM

So, I'm sorry, it's a long story. So they, oh, I remember now. I went back and forth with the attorney for Natick to figure out what we can do to have them be able to get the information they need from these observations to see if this was appropriate or not.

The parents in good faith were really trying to see what's there, see if they could work with them, whatever, but they were told that -- at that point I was told from the attorney for the school that the reason, and this was the first time we heard of this was in November, the reason the parents were not allowed to ask any questions was because Dr. Imber and Ms. Flax, according to the Natick Public Schools, in quotes interrogated the staff at the previous observation in June and had made everybody feel uncomfortable and all sorts of allegations.

11:33AM

In response to that, Ms. Flax and Dr. Imber emphatically deny this, and we ended up filing a motion to compel Natick to permit them to go and ask questions in their observations so that they could get the information they needed in order to be participants in the process as intended by Congress and to determine what's the best program for the child in concert with Natick, so we filed the motion to compel.

There were affidavits filed by Dr. Imber and Ms. Flax indicating why they needed the information, indicating that -- this is their practice, indicating the questions they did not get answered, they need to get answered. They were all pretty reasonable questions. They didn't even get syllabuses. It was extremely confusing, so they explained that in their affidavits. They also said under oath that they did not do anything inappropriate in June.

The Natick Public Schools responded to the motion opposing it basically. There were no counteraffidavits filed by anybody from Natick saying that they actually did interrogate or in any way make them feel uncomfortable. That was in November.

Then December came, January came. The hearing officer that was assigned to the matter at that point did nothing about it, about the motion, the motion was just sitting there, and both Natick and I were asking on every few weeks, you know, how is the motion coming, but it just never happened, and the

hearing was actually scheduled for January. We still hadn't gotten our response to our motion, which we filed in November, so at that point the hearing officer was changed to a different hearing officer, the one that actually heard the decision, and the hearing was rescheduled I believe to May at that point, and then that was January.

So January went by, then February went by, and March went by, and in April, they finally ruled on the parents' motion to compel the observations. At this point, the

11:35AM parents -- it was five months since they even had the questions, so it seriously prejudiced them in terms of them even remembering what they wanted to know at that point, but, regardless, the hearing officer denied the motion and said that the parents could submit brief written questions that will be answered in writing by Natick.

The parents really were not happy about this because they, first of all, couldn't even totally remember what the issues were because it was five and a half months ago, but, beside that, they couldn't really get information by just

11:36AM submitting written questions and receiving written answers. They just wanted to have a normal conversation like they do all the time. These people have major years of experience and they do all this. They do this in other districts. It was not unusual.

Anyway, they did the written questions because we

needed to move it along at this point. The hearing was scheduled to occur like in two weeks or something like that, so they submitted the questions, then Natick objected to the questions because they thought they were too complex or something, I don't know, but whatever the objection was, the hearing officer held a conference call and decided that actually she was going to change the questions to whatever she thought was appropriate, and Natick could answer yes or no to the questions, which most of the questions were yes or no questions, at least some of them were, so that was kind of a problem, obviously.

11:37AM

Anyway, the parents once again went along with it because we wanted to get to the hearing and continue this process, so they submitted the questions, and they got the answers to the questions, which weren't particularly helpful because it was just yes or no questions, new questions that the hearing officer said were okay to ask, and at that point it was like a week before the hearing was scheduled anyway, so the parents and also I should mention had done discovery as part of the process, which also was delayed until April, even though it was submitted in November asking for various documents, but also they asked for redacted IEPs of the children that would have been in the class with C.D. in all these years that the parents had been told that that was their proposal.

11:37AM

And upon seeing these IEPs, it was very clear, first

of all, that they were not told the correct information because there were kids with very significant disabilities, not just intellectual disabilities, not that they had to have them, but there were kids with behavioral problems, minor behavioral problems but still behavioral problems.

By the way, C.D. has never had a behavioral problem in her entire life. They had kids that said they were nonverbal. None of this was told to the parents ever. They were told that, you know, it's appropriate basically, that's all they were told. They were never really given any significant information about the profiles of the students there until they saw the IEPs, which were clearly now it was more inappropriate than it was before.

11:38AM

So the hearing was scheduled for May of that year. The parents actually subpoenaed Mr. Francoise, who was the teacher for the ACCESS program when they observed because they wanted to get it on the record they didn't do anything wrong because they didn't do anything wrong, so they subpoenaed Mr. Francoise. Natick did not have him at the hearing apparently because he wasn't on the witness list.

11:38AM

So, anyway, they did that, and the hearing was held. The parents presented evidence from, I'm sorry, the parents presented I believe like five or six witnesses. It was Dr. Imber, Dr. Roffman, Nan Coellner, Ms. Flax, Erin, Dr. Gibbons, who's a neuropsychologist who had done testing of

C.D. All of these people were highly, highly, highly, not only highly qualified, exceptionally qualified, experts in their fields, but they knew C.D. for years. They had worked with her daily some of them for years. They had read all of her evaluations, they had read all of her IEPs, they were totally knowledgeable as far as they could be about this child.

So they all testified, and Natick had brought up as far as their witnesses go, they had Ms. Liptak, that was her name. She was the teacher at the summer program who did not attend the meeting, but she testified at the hearing. They also had Donna Cymrot testify, who was the school psychologist that did the psychological evaluation and determined that C.D. she changed her disability category, however, on cross-examination, Ms. Cymrot admitted not only that she hadn't read the IEPs, that she didn't have access to the IEPs, that she didn't read most of the evaluations, and that, most importantly, she did not test an area of C.D.'s skills, her daily living skills to determine whether or not an intellectual disability is an appropriate category.

It's a requirement to do that in order to make the appropriate determination, and she admitted that she didn't do it because she knew -- I don't know what the reason was, but she admitted that she didn't do it and that she barely knew anything about C.D., and most of the Natick witnesses barely knew anything about C.D. They had tested her once, some of

them, others had not done anything.

Mr. Francoise, interestingly, had been replaced, had been the teacher of the ACCESS program for years, like 13 years, a new teacher who just graduated from her program, whatever, Ms. Michelson had now become the head teacher of the ACCESS program, and she testified for Natick about the ACCESS program.

However, we did have Mr. Francoise there because we subpoenaed him, so he testified, and he testified about the people in the class, the profiles of the students.

11:41AM

THE COURT: He's the lead of the ACCESS program; is that right?

MS. MARTUCCI: He was the head teacher for the ACCESS program for 13 years, and he was replaced by Ms. Michelson a couple months before the hearing, I believe. So he testified not only that there were children in the ACCESS program that had issues that we were not told about, but also he made it very clear that nothing inappropriate happened at the June observation. It was very clear, and then so that was his testimony.

11:41AM

Natick testified that everybody thought ACCESS was appropriate. Not only that, they thought that the new program was appropriate. They were a totally different programs, so it's not clear how they could both be appropriate since nothing had really changed. They also basically, they just said it was

fine, everybody just thought it was fine, but there was no real discussion about why it was fine. They just said we think it's appropriate then, we think this is appropriate now, that's it.

So that was the hearing. It seemed that it was pretty clear after the hearing that we believe we had met our burden of proof and beyond based on all the facts, evidence I just mentioned and that you have on the record, which is eight volumes, over 4,000 pages.

In July of that year, then we received the hearing
11:42AM decision from the hearing officer denying everything. She basically said that all the IEPs, 2012-2013, 2013-2014, 2014-2015 all provided C.D. with a free, appropriate public education in the least restrictive environment.

Her reasoning doesn't make a whole lot of sense because if you read the decision, she did not apply the appropriate standard under the *Rowley* decision to look at whether or not the district complied with the procedures under the Act in determining the placement, and it was clear that the district did not.

11:43AM The district never discussed the supplemental supports and services that could be done, they could never looked at a variety of sources, they didn't do a transition assessment, they didn't have knowledgeable staff. It was everything that they were supposed to do that they didn't do.

So the hearing officer didn't mention any of that, she

just somehow came up with a whole new theory of how to determine whether or not an IEP is appropriate on her own. She decided that the reason it's not appropriate is because, in terms of her decision anyway, is because, according to her, and this is sua sponte, nobody brought this up at the hearing, she said that the program at McAuliffe was actually more restrictive than the program that was being proposed by Natick. First of all, that's not the standard. The standard is clear.

Also, it's not even true because she had said that the reason why it was more restrictive is because at the McAuliffe program, C.D. had a one-to-one help constantly throughout the day, and in the ACCESS program, she would be able to independently access whatever they were teaching in that class, so according to her, that's why it was less restrictive.

Not only is it the wrong way to determine whether or not an IEP is appropriate at this point, as is found in the *D.B. vs. Esposito* case, the inquiry is not comparing two different programs anyway, it's following the standards of the law in looking at the particular IEP in that point in time it was developed and in deciding whether or not that was appropriate, so that was wrong anyway, but, beside that, she also said Ms. Coellner and Ms. Soden provided constant support. It's totally not in the record.

There was no evidence that she received constant support anyway, but in addition to that, suggesting that she

could independently access the curriculum, that made it better flies right in the face of the whole purpose of having supplemental support and services in general ed. so that you can access more enriched curriculum.

The point is not to put a kid in a more restrictive environment when they can do it themselves, as opposed to putting them in a general ed. where they can do it with a little support, which is what the parents wanted, which is what Congress wanted, but the hearing officer decided that it was actually better for her to access it herself, access the curriculum herself in ACCESS.

So that was her rationale for deciding that the IEP for 2012 was appropriate. Then the hearing officer also decided that the IEP that was proposed next even though there were no changes made was also appropriate.

And there was no mention of the fact that there was still no discussion of supplemental supports and services before removing from general ed., there was still no transition assessment, but none of this was mentioned, and the interesting thing is that if you read the decision without having the record, it's like a whole different case because what the hearing officer did is she omitted all the evidence that the parents provided that could prove their case, so it looks like the parents did nothing if you look at the decision on its own.

That's not clearly what happened when you look at the

record, so she decided that it was fine even though they didn't update the annual, they didn't update the goals, they didn't look at her progress as required under the law annually by the Act. They didn't do that, and they proposed the same exact thing, and the reason for denying it was because the same reason she denied it before, the 2012 one, which is weird reasoning because IEPs should be looked at on their own for one thing, but if it was in inappropriate in 2012, it was still inappropriate, so that was an odd rationale. So that was the 2013-2014.

11:46AM

The hearing officer indicated -- I'll stick with the IEPs first quickly. For 2014-2015, the hearing officer decided that also provided C.D. with a free, appropriate public education in the least restrictive environment, even though now it was different, but it still worked basically is what she said.

She didn't mention again -- actually she did mention there was no transition assessment done, but she said, which is very perplexing, this is not in accordance with the law, she

11:47AM

said that although a transition assessment had not been done and the goals and objectives might change once it's done, it had no effect on the validity of the IEP, which contradicts all the case law and everything else that is regarding transition assessments and the importance of having them in order to have an adequate transition plan, as offered for support as heard in

the *Dracut* case.

So she said all the IEPs were great, then she went on to say that the parents' witnesses were being discounted by her. She discounted the father's testimony entirely because she said that he did not have credentials in education, and so for that reason she found everything he said was invalid.

That is obviously a fallacy because what he said has nothing to do with who he is. If it's true, it's true, and it was true, everything he said was verifiable on the record, including that she could not take the MCAS, that her services would be messed up by the proposal, et cetera, it was all verified on the record, but, she said, of course, he didn't have educational credentials, she was not going to consider his statements to be valid, which is interesting.

And, of course, parents are so important to the process, plus they know the children better than anyone else, so to throw out the testimony and to say that what he said doesn't make any sense and doesn't have any validity because he's not an educator would throw out every parent. Most parents are not educators.

She also said, well, she issued the decision, then two days after issuing the decision, she issued, reissued a decision, which she said was because she had inadvertently left out two paragraphs at the end of the thing that said when you read the issued decision that she decided not to rely at all on

Dr. Imber's testimony or Ms. Flax's testimony, and her reasoning was because with Dr. Imber -- well, first with Ms. Flax, she threw out her testimony because she said that Ms. Flax had said that C.D. would not have any peers, appropriate peers, and she did not think that inclusion was appropriate, but she twisted the testimony because the testimony of Ms. Flax was that she should not be learning prep. at this point because she's been there for four years and she's doing well, and they still wanted to put her back in the ACCESS program, so as far as peers go, she's known the child since fifth grade. It's reasonable for somebody to say, especially when you see who her peers were in ACCESS that she didn't believe it was appropriate.

So, regardless, even if it was true, it's not a valid reason in my opinion to throw out the entire testimony of the speech language pathologist who had worked with the child since fifth grade. Then she also said I'm not going to rely on anything Dr. Imber said, with over 40 years as an educator/professor, et cetera, and knowing C.D. since fifth grade, she was throwing out his testimony because according to her, he changed his testimony based on what the parents wanted.

Now, first of all, he didn't do that. There's no evidence he did that. The only evidence allegedly that he did that was in Natick's opening statement where they said that they allege that he did that, she never did, and it was never

proven at the hearing, but she grabbed onto that and cited for that reason, she was not going to consider him to be a valid, credible witness, so she threw out his testimony.

She also said she did not rely on the reports that were submitted by Dr. Imber or Ms. Flax or by Dr. Roffman because they were submitted to the hearing five days before the hearing, which because they could not complete their reports, as I said, because of the whole issue of the observations and the questions being unanswered, but, regardless, they submitted their exhibits, sorry, their reports five days before the hearing, so at least they could be considered for the hearing.

The hearing officer said she wasn't going to deal with them at all, count them at all because of that, and she's actually correct. I agree with that decision in terms of the fact that she couldn't -- they couldn't -- Natick did not have time to redo anything, to look at the reports and adjust the IEP for 2014, the last IEP, but all the other IEPs were in those reports, the expert's opinions about those IEPs, their observation, their test results, everything, so there was plenty of probative evidence in those reports that she decided not to even look at, I guess, so they were thrown out.

Based on all that, she came to the conclusion that all of this -- oh, and I should mention also that we had several teachers testify from Learning Prep., including the principal of Learning Prep. explaining their knowledge that they had

daily of C.D.'s needs, et cetera, and she didn't even mention that they even testified, I believe.

It's appropriate, I understand why under the law, the Burlington test, you would need to prove that the public school failed to provide an appropriate placement before they determined whether or not the private placement, the unilateral placement provides the same, so she didn't have to reach the second part because she had decided the first part was not in the parents' favor, however, they provided valid evidence, they provided good evidence about C.D.'s current needs and how she's doing and what kind of program she needs, everything. She didn't mention any of that. That was all out of the decision, and so it was kind of shocking actually to be honest that this was the decision.

I'm probably forgetting some things that were in it, but at that point we filed for an appeal because we really don't believe that this is just at all or in accordance with the law or anything else, and I could answer questions because I probably left stuff out.

11:52AM THE COURT: All right. Why don't we hear from counsel for Natick, I'm sorry, your name again is?

MS. VASUDEVAN: Sure, it's Felicia Vasudevan.

THE COURT: Vasudevan, okay, go ahead.

MS. VASUDEVAN: Good morning. So I want to start by saying we disagree with a lot of the factual recounts that

Attorney Martucci gave, and so I'll try to go through them. I was trying to take notes, but as an overview, I think the record is clear that Natick has at all times proposed a free and appropriate public education for the student. It may not be what the parents' idea of a free and public education is or the parents' expert's ever-changing moving target about what the student's needs are, despite her profile remaining the same throughout this time period, but Natick has proposed a free, appropriate public education in the least restrictive environment.

11:53AM

In contrast, the student does not receive an appropriate education in Learning Prep., a private special education school where all of the students have disabilities, and she has no access to no typical peers, which is something that the parents' experts and the parents are saying today is so important. Parents' argument seemed to be nothing more than I want what I want, and the opinions of the Natick's educators mean nothing.

First I want to start with as a student was going through the history when the student was transitioning from McAuliffe to potentially Natick. As Attorney Martucci said, the standard is that Natick has an obligation because she had an IEP coming in from McAuliffe to provide a comparable placement, and in contrast to what Attorney Martucci said, what Natick offered as a comparable placement at the time was not

11:54AM

ACCESS classes but replacement classes, and you can see that on page 380 of the record and 2349 of the record.

Ms. Dalan sent a letter to the parents saying that she thought the comparable placement was replacement classes, but from what she saw, she thought that potentially the appropriate program was the ACCESS program. The parents then sent a letter through Attorney Martucci rejecting the comparable and telling Natick that they should hold a meeting to propose what they think is appropriate.

11:55AM When all this was happening, it was the end of the school year. Natick had no obligation to convene a team meeting because it was the summer, but in a process of trying to work with the family, they convened a meeting in July, 2012 to discuss what they thought was appropriate for the student.

And at this meeting, everyone was statutorily required to be at the team meeting. The IDEA requires a special ed. teacher, a regular ed. teacher, parents and a representative of the LEA. All of those individuals were present at the meeting.

There was a special education teacher from Natick, who 11:55AM could explain the special education programs, including replacement classes and the ACCESS program. There was a general ed. teacher, and there were many representatives from the Natick Public Schools as well as the parents, so the team was properly composed, and the whole transcript of the July, 2012 team meeting is in the record, and in contrast to what

Attorney Martucci said, there's a very definite process that's outlined in the Massachusetts regulations about how team meetings have to occur.

You don't consider the placement before you consider the appropriate services, the appropriate services, types of curriculum that the student requires, so the first part of the IEP team meeting is about the student's performance levels, what services they require, small group instruction, what type of things that they require, and that's what happened at this July, 2012 team meeting.

11:56AM

On page 395 and 396 of the record, testing was discussed, then there were discussions about how she was accessing the instruction in McAuliffe, and then the team thereafter moved on to discussions about placement, and so we were thinking about the first part of the inquiry about what services the student required. I disagree with the characterization that the student had a mild disability.

If you look at the testing results that Natick had at the time and that are still in effect today, no one disagrees that the student's profile has remained constant throughout the time period. She is borderline cognitively, then if you look at her academic testing, she is anywhere between seven at the time in July, 2012, she's between seven and four years below grade level, and then when the parents say that, you know, there wasn't significant support with this one-to-one aide, but

11:57AM

that's their characterization of it.

When you look at what the one-to-one aides actually did, it was much more significant than how they're characterizing it. You know, the one-to-one aides that were there were cueing her as necessary, modifying all the curriculum, you know, creating special work for her, so it was very significant support that she was receiving, and she wasn't receiving the same curriculum as all the other students in McAuliffe, and you can also see that in the IEP and in the current performance levels from McAuliffe.

11:58AM

Everything that she was doing was with significant support, so when you look at all of this information, you see that what she really requires is small group instruction based on her disability, her profile, how she accesses curriculum. She requires small group instruction. She requires significant modification of the curriculum, and, in fact, the parents' experts, Dr. Gibbons, has argued that that's exactly what she requires, and you can see that in her testimony at the hearing and in her reports.

11:58AM

So once there's a discussion of the appropriate services she requires, then the next inquiry is what is the appropriate placement in the least restrictive environment, and you can see that in the case law in *Alloway*, the least restrictive placement is only appropriate to the extent the educational environment is appropriate.

If the educational environment is not appropriate, then there's no need to consider what the least restrictive environment is, and, similarly, in *Daniel R.R.*, they say that mainstreaming can only be considered in conjunction with what is appropriate for the student, and sometimes students' needs are so severe that they require a separate environment, and based on all of the facts I just told you about the student, that was the case.

ACCESS was the least restrictive environment to give her that specialized instruction that she required, while also giving her access to typical peers, so she would be able to have electives with typical peers but have the small group instruction that she required.

There's a lot mentioned of the 2011 BSEA decision. The 2011 BSEA decision was not brought up at all in the July, 2012 meeting, but I do think it's important that everyone, even the parents' expert acknowledges that her profile has not changed at all. The 2011 BSEA decision, which the parents never challenged, found that the ACCESS program was appropriate for the student for all of the reasons that I just outlined.

And it's also interesting I think when you think about the parents' argument, on the one hand, they're arguing that the student should be in a general ed. class, on the other hand, they're arguing that Learning Prep. is the appropriate program where she has access to no typical peers, and the

parents haven't really reconciled that argument. It doesn't make any sense.

So then moving onto the 2013-2014 IEP, I agree that it was largely similar, but if you look, the Natick Public Schools had requested information. There's evidence on that in the record, had requested information from Learning Prep., but Learning Prep. had not provided any information, and there is case law that says when a parent unilaterally places, for example, in *Roland*, the parent unilaterally placed at Landmark, then Landmark didn't show up for the team meetings, and the Court held that there was no procedural error.

12:01PM

Similarly here, Natick can only propose an IEP that's appropriate based on the information that it had, and Learning Prep. hadn't provided it, it had provided some information but not enough information to completely revise the IEP, so the IEP that they proposed was appropriate based on the information that it had, which was similar to the information from 2012-2013.

Then we move to the 2014-2015 IEPs, and the first IEP was largely similar because the idea was that they were going to be doing the three-year re-evaluations of the student, and the three-year re-evaluation of the student was delayed. The consent form was sent to the parents, but the parents refused to sign it, so that was the reason for the delay. They didn't agree to sign it until there was a team meeting held.

12:01PM

After the three-year re-evaluation, then seeing the new information that Natick had, they proposed a different program, as Attorney Martucci had said. It was a blended program with some replacement, some general ed. and some ACCESS classes, and the idea was to keep the student in ACCESS for math because math was a significant need for her and also to keep her in ACCESS for reading comprehension because that was a significant need, but writing was a strength, so she would go into the replacement classes for writing, and so this program would allow her to have English, language, arts in some form every day and address both her strengths and her weaknesses.

12:02PM

And so another point that I want to address is that students in the ACCESS program do not take MCAS, but it's throughout the record, and even the July, 2012 meeting and through all the Natick staff who testified that students are commonly moved to replacement classes where they do take MCAS, and that was always the goal, that the team was going to reconvene in October, 2012 and throughout the time the student was there to see if they could always push her to replacement classes, and that was the ultimate goal.

12:03PM

And so Attorney Martucci said that it's weird that the 2014-2015 IEPs were different, but the reason they were different is because Natick had more data to change the IEPs, and that's exactly what you would expect from the team process. The IEPs changed as more information becomes available to

Natick.

So moving onto the transition planning, assessments, so there is this requirement under federal law from age 16 onward and from state law 14 onward to do transition planning and to do a transition assessment, but I think it's clear from Massachusetts guidance, there's a technical advisory that's cited in our opposition that a transition assessment doesn't have to be a formal stand-alone transition assessment, that any assessment that's conducted when the students are between the age of 14 and 22 that gives information that could influence transition planning is a transition assessment, so to say that there is a procedural error because Natick didn't do a transition assessment is not accurate, but Natick eventually did a transition assessment.

Before that it had enough information to do transition planning, so in the July, 2012 IEP that was proposed, there is vocational services that would be provided that are transition services. The team also said that they would meet in October to do a more in-depth transition planning, and then subsequent IEPs have transition plannings.

I do note that it's not required according to the *Sebastian M.* case, it's not even required that there be a standalone transition plan, the question is whether there is transition planning in IEP, and if you look at the record, there are significant -- there's transition planning in all the

IEPs that were proposed, and, for the record, Learning Prep. it's in the record, doesn't even start transition planning until the eleventh grade.

So the next parents' criticism is that the transition planning was inappropriate for the student because it was in the after school setting, but at the team meeting where they were discussing the provision of services, Natick offered several schedules and discussed several potential options for how to provide the transition services, and it was decided that the after school plan would be the best because it would allow to student to engage in electives during the day and also get the transition planning.

12:05PM

And the parents' expert, Dr. Roffman, her biggest critique of Natick's transition planning was that it was inappropriate because it wasn't tied to the student's interest, but Natick described through Ms. Brown, who is the Natick transition person, how would they align the transition planning to the student's interest, so, for example, if the student was interested in fashion and cooking, they would create job shadowing and internships and work with her to create a plan to be able to start careers in either industry.

12:06PM

The parents also allege, and Attorney Martucci said here today that the change in disability category was made outside of the team process, and I think that's just completely factually inaccurate if you look at the record.

So Ms. Cymrot did an evaluation in May, 2014, and subsequently the discussion of potentially changing the disability category was discussed at two team meetings, May, 2014 and November, sorry, June, 2014 and November, 2014, and if you look at the transcripts from those meetings, you can see that Ms. Cymrot discussed in detail her evaluations and how the student had longstanding deficits in language understanding, reading comprehension, written language, and why she was recommending changing the disability category.

12:07PM So it was discussed at a team meeting. The parents commented on the change in disability category, and then the parents received notice of the change in disability category through the N1 and the proposed IEP. The parents stated in their opposition that N1 is evidence of the determination being made outside of the team meeting, but that doesn't make any sense. The N1 is a summary of what happens at the team meeting.

Additionally, not only was this determination made through the team meeting, but the parents can't point to any

12:07PM impact of the change in disability category on the service delivery. As you can see from all the transcripts in the record, the question is what the student needs, not the specific label given to the disability, and all the service providers for Natick at the hearing testified that they wouldn't have changed the services just based on the disability

category, the question was what the student needed.

So now just moving onto the general procedural violations, the parents argued, Attorney Martucci argues that one of the procedural violations is that the parents didn't get to observe or ask questions, but here today, Attorney Martucci admitted that they got to observe in June, 2014 and November, 2014, and not only that, if you look at the record, some of the observations were hours long.

The parents were able to ask basic questions. I think
12:09PM one of the things she said is that they weren't allowed to ask basic questions, but they were allowed to ask basic questions, not detailed questions, and that's because school is going on, the staff have to be working with the students, they can't be available to the experts just at their whim.

So if you look at the case law, there's *L.M. vs. Capistrano*. California has a similar law to Massachusetts about allowing parents the chance to observe, and in that case, similar to this case, the school district restricted the parents' experts to 20 minute observations. Here, we actually
12:09PM gave them more time than 20 minute observations, and the parents allege that this was a procedural violation.

The District Court -- sorry, the Ninth Circuit rejected that argument and said that the parents couldn't present any evidence that undermines the credibility findings or any evidence that they would have received through more

classroom observation time.

Here, the parents had a significant amount of evidence provided to them. They were able to ask whatever questions they wanted during team meetings. In fact, in the May, 2013 team meeting to develop the 2013-2014 IEP, the Natick staff asked the father if he had any questions, and he said no. The staff were always available to answer questions. The parents were able to do observations, so they received enough information to meaningfully participate in the decision-making process.

12:10PM

The next sort of procedural error that the parents allege is predetermination of the July, 2012 meeting, and I think if you look at the case law, school districts don't have to come to meetings with a blank mind, all they have to do is come to the meeting with an open mind, they don't have to come to a meeting pretending not to have any idea about what an appropriate placement would be, they have to review the record, they're going to come up with an idea about what they think is going to be appropriate.

12:11PM

And along those lines, and the First Circuit case, *G.D. vs. Westmoreland*, the Court concluded that there was no predetermination, even though the school district came to the meeting with a draft IEP, and if you look at the July, 2012 meeting, you can see that Natick spent a significant amount of time listening to the parents asking questions.

The fact that they ultimately disagreed based on all the information that they had in front of them doesn't mean that they predetermined the outcome of the meeting.

So then another thing that has been thrown out by the parents was that there was an error in the hearing officer's determination in making the credibility determination, but I think if you look at the case law, credibility determinations are precisely the first instance administrative determination that's given judicial deference, and in this case, the hearing officer had significant reasons for discrediting the testimony of the parents' experts.

So, first, Ms. Flax steadfastly maintained at the hearing that the student would not benefit from any inclusion, a statement that wasn't supported by any other witness and contradicted her prior recommendations.

She also made sweeping generalizations, such as the students in the ACCESS program were nonverbal, which was discredited at the hearing. She had no idea whether they were nonverbal or not. She made another sweeping generalization that the student would have no friends in the ACCESS program. Her statement was just pure generalizations, and then with Dr. Imber, Attorney Martucci said here today that there was no evidence that he had changed his opinion over time.

I think if you look -- and the sole evidence for that came from the opening statement of the attorney for Natick. I

think that's factually inaccurate. If you look at the cross-examination that the attorney for Natick did of Dr. Imber, you can see that she pointed out how his recommendation had changed over time and that the recommendations of Dr. Imber really coincided with wherever the student was placed.

In the prior 2011 BSEA hearing, Dr. Imber recommended what the parents wanted, inclusion. In the July, 2012, Dr. Imber recommended what the parents wanted, inclusion. As soon as the parents unilaterally placed the child in Learning Prep., then Dr. Imber's recommendation magically changed to Learning Prep., and the father's testimony, the hearing officer properly discounted his opinions about what educational services the student would require. He has no expertise in education.

And then when you look at her crediting of Natick's witnesses, there's significant evidence for why she credited their witnesses. Ms. Cymrot is a licensed school psychologist who's worked for Natick for over 20 years. She explained that the reason she didn't test that one area that Attorney Martucci represented in oral argument is that it had previously been tested, so there was no need to duplicate the efforts.

She testified extensively about what she thought was appropriate. Similarly, Ms. Liptak had 17 years of experience as a special education teacher. She had taught students and

was familiar with the ACCESS program and had also worked with the student over the summer and could talk about what the student required.

So the last issue I want to talk about is the reports that the hearing officer wouldn't credit, and I think there's case law that's directly on point for that, so if you look at a recent case, May 31st, 2016 decision out of this court, *Jacob Doe vs. Richmond Consolidated*, in that case, it was the same exact issue. The hearing officer refused to admit reports that had been submitted according to BSEA rules within five days, but the Judge explained that those reports were not relevant, that the school district, they weren't available or considered by the team when the IEPs were created, and, similarly here, the reports that Attorney Martucci is talking about that the hearing officer didn't rely on weren't ever made available to Natick to consider as part of the IEPs that were developed and were considered by the teams at issue in this case.

12:15PM

And the last factual thing I just want to say is the characterizations of who would be in the ACCESS program and the replacement classes with the student. If you look through the testimony, I think it's pretty clear that the characterizations that Attorney Martucci made are not accurate and were debunked, that there weren't large behavioral issues in the ACCESS program. They're like any public school. There is occasional

12:16PM

behavioral issues, but the students in the ACCESS program were generally well-behaved, and I think that's it unless you have any questions.

THE COURT: No, thank you. Ms. Alvarez, do you want to weigh in?

MS. ALVAREZ: I don't have anything substantive to what Natick has offered, and we rely on the arguments they made in their brief, and we ask that you affirm the hearing officer's decision.

12:16PM THE COURT: Okay. Ms. Martucci, a quick reply.

MS. MARTUCCI: Yes, sir, I'll make it as quick as I can, your Honor. Thank you. With regard to the argument made by my Sister counsel about LPS being more restrictive than the ACCESS program, that is totally an inappropriate comparison. As this Court has found --

THE COURT: LPS is Learning Prep.?

MS. MARTUCCI: Learning Prep. School, I'm sorry. I'm used to saying LPS. The restrictiveness of Learning Prep. School is not relevant to whether or not the proposed placement

12:17PM at Natick was appropriate, first of all.

Second of all, the unilateral law regarding unilateral placements is not exactly the same as far as what the restrictiveness test is because when parents place a child, unilaterally the test is not as strict. It has to just be appropriate for the child's needs, it does not have to meet the

strict standards that a school district has to meet, but, in addition to that, LPS is actually not more restrictive than Natick in many ways, which is that she's being prepared for the MCAS, she passed the MCAS in tenth grade. She was accessing the Mass. Curriculum Framework.

She's with many, many children. She goes from class to class by herself. The children there have much less severe disabilities than the children in the ACCESS program, and, in addition, the children -- oh, and the transition program at LPS does not start in the eleventh grade. That's very clear from the record. They start to transition when the child -- before C.D. even enrolled, they always are thinking transition at Learning Prep., but it's very clear that she had classes that are aligned to the transition program from the time she entered the school, it's very clear. It's all in the record, and the staff from Learning Prep. testified to that.

As far as the parents saying that they always just wanted what they wanted, that's absolutely not correct, and it's very clear from the transcripts and the testimony. They just wanted their child to have an appropriate education. They did not want her to have the Cadillac education, they did not want her to have whatever they wanted, they just wanted her to have a free, appropriate public education that met her needs.

They wanted -- that's all they ever asked for, and as far as their intent to place her at LPS, they looked at many

things. They looked at charter schools, they looked at other schools in the area, technical schools. At this point, they had to make a decision. That's the law in this country that when a parent cannot -- when the district does not propose appropriate placement, the parent has to take a chance and do something. They can't be expected to put the child in an inappropriate placement just to prove that they were right rather than putting the child in an appropriate placement where they haven't been provided with FAPE. That's their right.
12:20PM They took a chance when they do that, and my clients have definitely taken a chance, but he did what he thought was best for his child in order to do that.

As far as the replacement classes being offered by Ms. Dalan, I just want to clarify that. Ms. Dalan did offer replacement classes in a letter, first of all, not in an IEP meeting, and that was fine because it was based on the regulations for transfer students who get a temporary, comparable IEP. The parents asked for a new IEP so the child is not moving around, they hope, not starting in a
12:20PM self-contained class.

Then when we had the meeting, that's not what happened, but the point is that once we had a meeting to do a new IEP, Ms. Dalan's offer outside the IEP meeting process was off the table. That was never a real offer. It was never a real offer, it was only an offer for a culpable IEP until

October when based on everything we've seen, now it's likely, it's definitely reasonable for the parents to be concerned that in October the temporary IEP somehow would disappear and they would end up back in ACCESS, so they needed to make a decision for the child. It was August. She needed to start school, high school, and they needed to make a decision, and that's why they made a decision.

As far as the meeting, the staff at the meeting were very clear that they decided on her placement, proposed placement in ACCESS because of the discussion that happened at the meeting in the past at the hearing in front of Hearing Officer Crane.

It was not -- it was very clear why they got, they were saying they know her from years ago, but under *Roland*, they didn't know her. That's the whole point. *Roland* is very clear that the information that the IEP is based on is the information that is known by knowledgeable team members at the time the IEP is promulgated. It's the "known" or "should have been known" standard, and there was nobody at the meeting that knew her.

There are people that could know her. In fact, Ms. Liptak knew her, and as my Sister counsel said, Ms. Liptak really did know her, and she gave credible testimony according to her regarding the child's needs, so you can extrapolate from that if she had been at the meeting, which she should have been

in my opinion, she would have provided that information, and perhaps none of this would have happened, and she would have actually recommended that the child get in a more appropriate program at that time.

In addition, as far as the regulations for having team members, I don't totally agree with that. I believe that the regulations do say that if a special education teacher of the child is a requirement of the meeting, well, regardless, under separate regulation, it is very clear that placement decisions must be made by persons knowledgeable about the child.

12:22PM

There was nobody knowledgeable about the child except the parents' experts and the parents themselves, and so that's fine, if Natick didn't want to get knowledgeable people there, that's fine, but then the placement decision needs to be made by the people who are knowledgeable, who in this case happen to be the parents.

As far as the fact that they discussed things at the meetings, merely having the opportunity to ask questions at meetings and sit there does not equate to have meaningful participation under the case of *Doe vs. Hamilton*, and it's very clear from the transcripts that the parents didn't get answers to their questions. Natick already made decisions. They already offered one program. They did not come with an open mind.

12:23PM

I agree with my Sister counsel that you don't have to

come with a blank mind, but you do have to come with an open mind, and the transcript is very clear they did not come with an open mind.

This is an important point where Natick is arguing that she seemed so low functioning or whatever on paper. Well, first of all, that's the whole reason that Congress requires to have multiple resources. Plenty of people in the world do not appear like they should on paper only, but in this case, for this child, it's even more than the average person. It's really her unique profile is that she does not come across on paper as to who she really is.

The parents and their experts implored Natick to go and see her because they weren't making this stuff up. I mean, they worked with her every day. She did what they said she did.

As far as Natick disagreeing that she had the service, that she had the support she had, first of all, there's no basis for that other than the special ed. director who actually agreed with the parents that she wasn't having constant support, but, in addition to that, the fact that she would need support, that's the whole point of the Act.

The whole point is that it's okay to need support because it allows children to be integrated with other typical peers. That's the whole point, so there's nothing wrong with having a different curriculum or having some modifications or

having some support as long as it doesn't mean that they're not doing their own work and not getting any benefit.

That's fine, that's a valid argument, but not in this case because in this case, she clearly was getting benefit, and she was not having constant support, and, in addition, it's very important to note that the IDEA envisions -- the placement is based on a child's individual potential. The child does not have to -- I believe this Court discussed it in the *D.B.* case, the child does not have to do the same things as the other children. They do not have to meet the same standards as the other children. That's fine. That's the whole point, as long as they are making progress in terms of their own individual potential.

12:25PM

With regard to the *Daniel RR* case -- first of all, the school district in that case actually did everything that Natick didn't do. They put Daniel RR, and they tried, they put him in inclusion, and they tried to do everything they could for him, but he had severe behavioral problems, if I'm recalling, and eventually it just didn't work out, and that's fine, that's the law, but they didn't do that in the Natick case, and plus C.D. has never had any behavioral problems at all.

12:25PM

The fact that the profile has not changed is interesting because if the profile hasn't changed, then why did they want to change her disabilities profile as a matter, but

also if the profile hasn't changed, it begs the question that she was able to be in a better, in a more conclusive environment in 2012. They didn't need to wait until 2014 when they finally got more information that they were obligated to get under *Roland* all throughout the process to update their knowledge and make an appropriate placement, which they did not do.

Oh, and in the *Landmark* case, I believe what happened there was that -- not the *Landmark* case, the *Roland* case, the parents were actually -- they were at fault in some way, they were acting in bad faith, and that prohibited the school from getting the information that the school attempted to get, so that's not relevant to this case at all.

12:26PM

The parents in this case signed releases, and they did everything they could to assist. They brought people, they gave forms, they did everything that they could to get Natick up to speed. They begged Natick to get up to speed, but nothing ever happened with that.

As far as the allegations that the father refused to sign until a team meeting was held. That's absolutely not true at all. What happened was he was sent an evaluation consent form. He simply asked: When are the evaluations going to be? What are they going to test? When is she going to have it? He just had some basic questions, and Natick said that they didn't -- they weren't going to answer those, so at that point

12:27PM

he said I want a meeting to answer my questions.

He wasn't asking for an IEP meeting, he was just asking for somebody to answer his questions. As soon as they did, I believe it was April something, I think it was April 15th, the day of the meeting he signed the form, and the reason he didn't sign it in March was because the meeting wasn't held until April. They could have answered the questions when he first asked, and he would have signed it at that point, I'm sure.

12:28PM As far as students being constantly moved, first of all, that's not exactly accurate. Not all students are moved anyway, but it is true that students do need to be moved to take the MCAS, and while it may be true that some students move, the testimony didn't say that they're commonly moved, but, regardless, it doesn't mean that they were going to move C.D.

An IEP needs to be relevant at the time it's promulgated, not in the future of some potential possibility of being moved, plus given everything that went on in this case, 12:28PM the parents really didn't have a lot of confidence that she would be moved right, and I think they had a right to be concerned about that.

With the transition issues, the technical advisory does say it does not have to be a stand-alone form, that's true, but it needs to be integrated without the IEP goals and

objectives, and it has to be measurable to lead her to independent living. That was not there. They did have TPN forms is what they were called, but they were very vague. They didn't give anything based on any kind of assessment, and they were pretty useless, and that's what the testimony was at the hearing.

It was totally mischaracterized to say that Dr. Roffman said that they were not treated correctly. That's not what she said at all. You can look at the transcript of the hearing, obviously, but she also gave much more testimony than that one little thing, but what she was saying is what I just said much better, which is even if it is a stand-alone, it's not clear how it's measurable or how it's integrated to the goals, it's useless. They don't need to stand alone.

In addition, the argument that the technical advisory says that it could be any kind of assessment, it does not have to be a formal assessment. That's absolutely true, however, it's very clear in this case that there was no assessment done.

In fact, Ms. McGovern testified on cross-examination that there was no assessment done, it was not -- no formal, no informal, and no other information available to actually make an appropriate transition service plan.

In addition, the fact that they eventually did it is very similar to the *Dracut* case in this Court where they eventually did a transition assessment, but two years prior to

that, they didn't do anything, and that caused deprivation of educational benefits, substantive harm to the child in that case and in this case, we allege.

As far as her basic interests, first, her interests, Dr. Roffman saying her interests would not be tied to -- would not be available based on what they had available in Natick, the program they saw in Natick was children bagging cookies and children wiping down gym equipment, and basically that was being offered to her, and what was testified to at the hearing was that they would find something for her, they're sure they could find something for her in the cafeteria or whatever to bag cookies, but there was nothing that would be appropriate for her.

Since she's been at LPS, she has an internship, a weekly internship. She works in a store, she takes the bus, takes the T, whatever, she's totally becoming independent. She passed the driver's ed. written test.

Bagging cookies in the cafeteria is not aligned to her interests, it's not even like somebody of her level as far as her interest in cooking, but her career interest isn't in cooking, and that's also clear from the testing.

With regard to the notice about the change in disability category, the N1 is a notification form, but the notice of change in disability category is a prior written notice. That's prior to the change, not after the change,

that's why it's called that, and the -- it's required of schools when they unilaterally change a child's placement or identification, disability category, and in this case, there was nothing done prior to the change, and based upon the meeting, yeah, Ms. Cymrot did talk about what her evaluations were, but that's not the process to determine what the category is under which the chart is eligible.

There's a flow chart, which Ms. Cymrot admitted she didn't remember doing on her testimony, and also the testing of the child's daily living skills is a necessary component of making a determination that the child has an intellectual disability, and there's no way to make that because it wasn't tested.

As far as previous testing, there was no evidence on the record of what she was referring to when she said it was previously tested, so she probably didn't look at it anyway because she said she didn't look at most of the prior evaluations.

As far as there being no change in the category, the service delivery, well, that's supposed to be true, but it seems that suddenly it changed, and suddenly everything changed, so that's suspect.

With regard to the procedural violations, oh, they're asking basic questions, yes. They were allowed to ask basic questions or they were told they could ask basic questions, but

the affidavits of Dr. Imber and Ms. Flax and Dr. Roffman, their testimony said they were not even allowed to ask questions.

Dr. Roffman said she clearly couldn't tell what the kids were doing because she couldn't ask any questions. The fact that they could ask at team meetings is not a substitute for the service provided unless they were at the team meeting, which they weren't, but that was never said, and, again, asking questions is not a meaningful participation, anyway, the ability to ask questions.

12:33PM As far as the *Westmoreland* analogy, in that case, as she said, the school came in with a draft IEP. That didn't even happen in this case. I'm not sure why that's relevant.

It's absolutely correct that the administrative determinations of witness credibility are given specifically more deference to pretty much everything in the *Bettencourt* case, however, it was decided that even determinations of witness credibility can be satisfied by the reviewing court if it is unsupported by substantial evidence and arbitrary, and based upon the credibility determinations made by this hearing

12:34PM officer, she totally departed from the established law in this case under *Lessard* and *Sebastian* in this state -- in this country, under *Sebastian* and *Lessard* and -- well, at least those two.

Oh, more importantly, actually, under those cases, witnesses who have daily or more contact with a child, usually

the school witnesses in most cases, are absolutely considered to have more knowledge and are more credible than somebody, an outside evaluator who comes in and does a one-hour evaluation.

In this case, it was reversed as far as the parties' position, but it's the same argument, and, in addition, this hearing officer had a case against the Concord-Carlisle School District a year before our case was heard by her in which she specifically discredited all of the parents' witnesses based on the *Sebastian* and *Lessard* because they didn't have the credibility.

12:34PM

So she changed her mind, apparently, and while a hearing officer can totally depart from established precedents, they need to explain why they're doing it, otherwise, it's obviously an arbitrary decision, it must be because if you don't know the reason, what else could it be, how can you know?

As far as Ms. Flax saying that she would not benefit from inclusion, that is not true. That's in the record. She said she could not benefit at this point. She didn't see any sense at this point, that she could be returned to the Natick Public School, that's not the law, and that's fine if she was returned under an appropriate IEP, then that's what it is, but she was just saying that this child has been at Learning Prep. for three, four years at that point, and she is succeeding, and she's doing very well, and she doesn't recommend that she go into inclusion, even if it was offered at that point, which was

12:35PM

her recommendation, but she was talking about moving her from the school that she was succeeding in and had friends in and everything else for four years which she only went to because Natick felt it was a free and appropriate public education in the first place. She was only saying it wouldn't make sense for her to go back at that point in her opinion, and that's really logical when you think about it.

She also said as far as the nonverbal students, there absolutely were nonverbal students in the class. It depends on how you define nonverbal, I suppose, but it was definitely told that there was a child in that class who communicates first via an iPad, there was definitely a child in that class that was non-English speaking, and the point is that this child, C.D., has specific communication deficits and had benefited so much from being with typical peers who could be a good model for her that they were asking to put her back in a self-contained class after being three years in a regular class with regular kids, typical kids. I mean, that just treats her as a real person.

This is her life. You know, how would that affect a 14-year-old child going from three years of successful education in general ed. to a self-contained class with children who definitely have higher disabilities than she did, and as far as behavioral problems not being in the class, first of all, the parents' experts witnessed the behavioral problems.

These are not typical behavioral problems. There was

stimming, and there was an autistic boy that was sharpening his pencil for 20 minutes. Dr. Imber testified to that. There's no reason to think that he would not be telling accurate testimony under oath. It happened, and that is not typical. Yeah, there are kids that call out answers or whatever, but there aren't kids that do that in a typical class, and the staff from Learning Prep., the principal from Learning Prep. said the students in her school do not have behavioral problems like that, and if they did, they would have to be transferred out.

12:37PM

THE COURT: Okay. Let's wrap it up.

MS. MARTUCCI: I'll wrap it, I'm sorry, it's a long case. Dr. Imber recommended inclusion. His opinion didn't change over time. He recommended inclusion, not because that's what the parents wanted, he recommended inclusion because that's what Congress wanted. That's what he's always recommended. He only said that at this point the same reason that Ms. Flax testified, she's in the program, she's doing well, it doesn't make sense to move her at this point, although they would have to if an appropriate education was offered.

12:37PM

I'm going to quickly look at this. I just want to mention the hearing officer left out the entire, no mention of our entire motion or anything related to the fact that the parents were not able to get their answers or their questions answered or to observe under the law in Massachusetts, so

there's no way anybody who reads the decision would even know that that was even an issue.

In the *Jacob Doe* case, I'll quickly say what happened with that. Oh, that they had no -- that the courts said that there was not a procedural violation because there was no evidence and everything would have changed if they had more time.

Well, in this case, there was a ton of evidence, but the hearing officer left it out. There were affidavits and everything else and testimony that said what they needed to know, which affected their ability to do their report, and as far as the case, recent case in Mass. that said that the five-day rule doesn't allow an IEP report to come in, as I mentioned, earlier presentation, the parents were not asking for that.

12:38PM

We agree with that wholly, but only in this case for the most recent IEP, there was other information in there that was totally relevant to this case, tons of it. I think Dr. Imber's report was 80 pages long, so that's not comparable to the case in this court that was referenced.

12:39PM

THE COURT: Okay. Why don't we cut it off there, and I'm going to take the issues under advisement. I guess I'll leave it at that. Thank you. Have a good holiday, all, and I'll issue my opinion as soon as I can get it out.

THE CLERK: All rise.

THE COURT: Thank you.

(Whereupon, the hearing was adjourned at 12:39 p.m.)

C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing transcript, Pages 1 through 70 inclusive, was recorded by me stenographically at the time and place aforesaid in Civil Action No. 15-cv-13617-FDS, C.D., by and through her PARENTS AND NEXT FRIENDS, M.D. and P.D., vs. NATICK PUBLIC SCHOOL DISTRICT and BUREAU OF SPECIAL EDUCATION APPEALS, and thereafter by me reduced to typewriting and is a true and accurate record of the proceedings.

Dated October 17, 2017.

s/s Valerie A. O'Hara

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VALERIE A. O'HARA
OFFICIAL COURT REPORTER